IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1687 of 1980

with

CIVIL APPLICATION No 990 of 1987

with

CIVIL APPLICATION No 9001 of 2002

with

CIVIL APPLICATION No 1638 of 2003

with

CIVIL APPLICATION No 1639 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

--/M

RABARI GOVIND KARSHAN

Versus

RABARI KARSHANBHAI ALABHAI SINCE DEC'D THR'GH HIS HEIRS

Appearance:

1. First Appeal No. 1687 of 1980

MR RA MISHRA for Appellant

MR SM SHAH for MR MAHESH M DAVE for Respondents No. 1,3

UNSERVED-EXPIRED (N) for Respondent No. 1/A,1/D

MR BM MANGUKIYA for Respondent No. 1/B

NOTICE SERVED for Respondent No. 1/C,1/G

..... for Respondent No. 1/E,2

MR JN VASAVADA for MR BY MANKAD for Respondents No. 1/F,1/J-1/K,1/M

NOTICE UNSERVED for Respondent No. 1/H-1/I,1/L

MR VM TRIVEDI for Respondent No. 2/1-2/5

2. Civil Application No. 990 of 1987

MR RA MISHRA for Petitioner No. 1

..... for Respondent No. 1-3

3. Civil Application No. 9001 of 2002

PARTY-IN-PERSON for Petitioner No. 1

MR MAHESH M DAVE for Respondents No. 1,3

MR SM SHAH for Respondents No. 1/A,1/C-2

MR BM MANGUKIYA for Respondent No.1/B

4. Civil Application No. 1638 of 2003

MR RA MISHRA for Petitioner No. 1

MR MAHESH M DAVE for Respondents No. 1,3

1/A,1/C-1/E,1/G-1/I,1/L,2

MR BM MANGUKIYA for Respondent No. 1/B

MR JN VASAVADA for MR BY MANKAD for Respondents

No.1/F,1/J-1/K,1/M

MR VM TRIVEDI for Respondents No. 2/1-2/5

5. Civil Application No. 1639 of 2003

MR RA MISHRA for Petitioner No. 1

MR MAHESH M DAVE for Respondents No. 1,3

1/A,1/C-1/E,1/G-1/I,1/L,2

MR BM MANGUKIYA for Respondent No. 1/B

MR JN VASAVADA for MR BY MANKAD for Respondents

No. 1/F,1/J-1/K,1/M

MR VM TRIVEDI for Respondents No. 2/1-2/5

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 13/03/2003

COMMON ORAL JUDGEMENT

1. This appeal under Section 96 of the Civil Procedure Code is directed against the judgment and decree dated 11th July, 1980 passed by the learned Civil Judge (S.D.), Junagadh in Special Civil Suit No.21 of 1973 whereby the learned Judge dismissed the said suit. The facts leading to the present litigation between the parties are as follows:

1.1 The defendant no.1 Karsanbhai was employed in the Revenue Department in the State of Junagadh and, after independence, he retired as Special Officer in Mahaldhari Department in 1954, after about 36 years of service. He had married three times. By his first wife Raniben, he had two sons namely, the plaintiff Govindbhai and the defendant no.2 Kalabhai. His second wife was Rajiben and there were two sons of the said marriage, Vikram, the defendant no.3 and Hardas who had died and was not a party to the suit. Rajiben died in about 1949 and, according to the defendant no.1, in 1952 he divorced his first wife Raniben and married Bai Raji Dana. However, Bai Rani and the plaintiff denied that the defendant no.1 had divorced Bai Rani. According to them, Bai Rani had opposed the defendant no.1's intention to marry Rajiben and, though the defendant no.1 had started living with Rajiben, there was no formal marriage. It is not in dispute that the defendant no.1 had two sons, Vijay and Paresh and four daughters by Bai Raji Dana. No formal issue was raised at the trial as to the alleged marriage of defendant no.1 with Bai Raji Dana and nothing turns on it.

1.2 On 12th July, 1971, the plaintiff gave a notice (Exh.58) to his father Karsanbhai, the defendant no.1. He said that his father had married again in 1950 and thereafter, they were all living together and he was under his moral pressure and influence. According to him, when the defendant no.1 married plaintiff's mother Bai Rani, he was employed as a clerk on a meagre salary and, hence, his mother had started keeping buffaloes and selling milk. He asserted that she saved money and had acquired lands bearing Survey Nos.1435/1 and 1435/2 in the names of four brothers namely Kala - the defendant no.2, Vikram - the defendant no.3, Hardas and the plaintiff. He also asserted that, thereafter, his mother had purchased, from her income of milk business, Vadi lands in Talala and the defendant no.1 had no right or share in the said lands. Even then, the defendant no.1 had executed a partition deed on 6th May, 1958 under which the plaintiff's rights were extinguished. When the alleged deed was executed, the plaintiff was under the

influence and pressure of the defendant no.1 and he had obtained plaintiff's signature by misleading his mother. At that time, he was a minor and now, he realised that he had put his signature on the document without understanding the nature of the document and his interest. He said that he had never appeared before the Registrar to admit his signature before him. The deed was, therefore, not binding on him and it appeared to have been got executed by obtaining his signature on an old stamp paper. He, therefore, called upon his father to hand over possession of the said lands and said that, if he failed to do so, he would have to take necessary action to get the partition deed and all subsequent transactions cancelled.

1.3 The defendant no.1 gave reply on 9th August, 1971 (Exh.59). He denied that the plaintiff was under his moral pressure and influence. He alleged that from his childhood, the plaintiff had been inclined to go his own way and he had never obeyed him. He asserted that all the properties had been acquired from his own income and they were his self-acquired properties. He denied that they had been acquired by Raniben from her savings in the milk business. He asserted that all the brothers had executed the deed in question to him admitting the facts. He accused the plaintiff of ingratitude when he had brought him up, educated him and got him married. He said that the plaintiff was born on 6th July, 1939 and on the date of the deed in question, he was 18 years and 10 months old and was competent to understand what was written in the deed. He accused the plaintiff of lying when he said that he had not appeared before the Registrar to admit his signature on the document. He asserted that the deed in question was binding on the plaintiff.

1.4 On 17th March, 1973, the plaintiff filed the present suit against his father Karsanbhai Alabhai - the defendant no.1, Kalabhai Karsanbhai who was his real brother - the defendant no.2 and Vikram Karsanbhai, his step-brother - the defendant no.3. He prayed for a declaration that the alleged partition deed dated 6th May, 1958 was illegal, without consideration, had been obtained by coercion during his minority and that it was null and void. He further prayed for a declaration that he had a share in the suit properties set out in the Schedule and prayed for possession of the same.

1.5 In the Schedule annexed to the plaint, following properties were enumerated:

(1) Survey Nos.1435/1 and 1435/2 situated in Veraval admeasuring 10 acres and 21 gunthas, in all
(2) Survey Nos. 118/2 and 121/2 situated in Talala admeasuring 32 acres and 4 gunthas
(3) Plot No.318 in Veraval

He claimed 1/4th share in the said properties and prayed for partition and possession of the same.

1.6 In the plaint, the plaintiff's case was that his father, the defendant no.1 was employed in a low post in the Revenue Department at a salary of Rs.10/- and hence his mother had kept buffaloes and had saved money by selling milk. She had increased the number of buffaloes upto 22 to 25. From her savings, she had acquired Survey Nos.1435/1 and 1435/2 in 1941 in the names of plaintiff, defendant no.2, defendant no.3 and deceased Hardas. She had also acquired Survey Nos.118/2 and 121/2 at Talala ('Talala lands' for short). One plot bearing no.318 in Veraval town was also purchased in his name. He then referred to his father's relationship with Bai Raji Dana and said that there was a great uproar in their community and, though his mother had raised objections, they could not do anything. His father had started harassing them and, since he was a minor, he was under his father's control and influence and said that, in about 1951, while he and the defendant no.2 were minor, their signatures were obtained by their father under pressure. But they did not know what was written in the document. He alleged that subsequently the defendant no.1 put the date 6th May, 1958 on the said document and got it registered but he had never attended the office of the Registrar for registration. Recently, he had come to know about the document and when he obtained a copy, he knew that the document on which their signatures had been obtained by defendant no.1 during their minority had been got registered in 1958 and that it was a partition deed and that the plaintiff's right in the suit lands had been extinguished. His other brothers had got the properties and he was not given anything.

1.7 The defendants no.1 and 3 filed a common written statement and denied the various averments and allegations made in the plaint. It was asserted that the defendant no.1 had married Bai Raji Dana after giving divorce to Bai Rani, the mother of the plaintiff and defendant no.2, according to the custom of the community. As for the properties, they said that the defendant no.1 being a Government servant, he could not have purchased properties in public auction without permission and since

there was difficulty in obtaining permission, he had acquired Veraval lands in the names of the plaintiff, defendant no.2, defendant no.3 and deceased Hardas, who was a minor at that time, alongwith Mistri Ramji Premji and Virji Premji in public auction and he had paid the consideration from his own income. When the defendant no.1 gave divorce to Bai Rani in 1951, the said lands and the plot of land in Vadi were given to Bai Rani and the defendant no.2 for their maintenance. The plaintiff was a student at that time and he continued to live with defendant no.1. The defendant no.1 had sent him to Bombay for college education but the plaintiff could not pursue higher studies because he neglected his studies. The defendant no.1 had incurred considerable expenses on the education of the plaintiff. The Veraval lands being Survey Nos.1435/1 and 1435/2, which had been given to Bai Rani and defendant no.2, had already been sold by them and the plaintiff knew it. He had filed this suit in respect of the said lands so as to harass them. With respect to Talala lands, it was admitted that the lands had been acquired in the names of the defendants no.2 and 3 but the rest of the averments made in the plaint were denied. As for the plot no.318 in Veraval town, they said that the real number of the plot was 3 and not 318 and that the defendant no.1 had acquired the same in the names of the plaintiff and defendant no.2 since he was a Government servant but the same had already been sold 10 years ago. The plaintiff's suit with respect to that property was also futile. They denied all other averments made in the plaint.

1.8 The defendant no.2, who was the real brother of the plaintiff, filed a written statement in which he contended that he had separated from the family for family reasons for whatever property was given to him in 1951 but he said that he had been told that the joint status continued in respect of the plaintiff, defendant no.3 and deceased Hardas Karsan. He had admitted that he had executed the document but he said that he had relied on the assurance given by his father but he supported the plaintiff's other averments with respect to the said deed. He said that, according to his belief and understanding, only his share was separated under the deed. The document did not affect the plaintiff's share and hence, it was not necessary for the plaintiff to get the sale deed cancelled but he had no objection if the sale deed was cancelled in so far as the deed affected the plaintiff's right provided his right and interest were not affected.

1.9 Thereafter, the plaintiff sought and was granted

leave to amend the plaint. He added the averment in para 11(a) of the plaint to the effect that the alleged document only described the defendant no.2's share and only clarified that he had no interest in the rest of the joint properties and that the deed did not effect any partition of the plaintiff's share. He, therefore, claimed the declaration, in the alternative, to that effect. Only this averment was made and the consequential prayer of declaration was added by amendment but there was no prayer to amend the Schedule or to add any properties to it. Hence, the suit properties remained the same as they were before the amendment.

2. The learned Trial Judge raised the following issues at Exh.16:-

(1) Whether the suit is properly valued?

(2) Whether the plaintiff proves that the land bearing S.Nos. 118/2 and 121/2 were purchased by Raniben, mother of plaintiff out of her own earnings?

(3) Whether the plaintiff proves that the defendant no.1 got executed the partition-deed of the suit land under influence and pressure?

(4) Whether the plaintiff proves that he is not bound by the release deed dt. 6-5-58?

(5) Whether the plaintiff has share in the suit land?

(6) Whether the plaintiff is entitled to recover possession of the suit land from the defendant no.1?

1(a) Whether the suit is bad for non joinder of necessary parties?

4(a) Whether the said release deed is executed also for partial partition and separation of the defendant no.1 from the joint family and not for the extinguishment of plaintiff's right from the suit properties?

6(a) Whether the suit of the plaintiff is barred by limitation?

3. After recording the evidence, oral and documentary, led by the parties, the learned Trial Judge answered the issues no.1, 1(a) and 6(a) in the affirmative and the other issues in the negative. In view of the said findings, the learned Trial Judge dismissed the suit.

4. The plaintiff has, therefore, filed this appeal challenging the said judgment and decree.

5. It is an admitted position that Survey Nos.1435/1 and 1435/2, which had been given to defendant no.2 and the mother of the plaintiff and defendant no.2 in the deed under challenge, had already been disposed of by the defendant no.2 and his mother before the suit was filed. It is also an admitted position that the plot at Veraval had also been disposed of long before the suit was filed. Hence, it is not in dispute that the dispute in the suit survived only with respect to the Talala lands namely Survey Nos.118/2 and 121/2.

6. The main thrust of the plaintiff's case at the trial was that the said lands had been acquired by his mother from her earnings and that the defendant no.1 had no right or interest in the same. The parties' attention was also focussed mainly on this issue. In support of this contention, the plaintiff and his mother gave oral evidence but they could not produce any documentary evidence to substantiate their contention. The defendant no.1 also gave oral evidence in support of his contention that he had purchased the said lands from his income and that since he was employed in the Revenue Department, he could not have acquired property in auction without prior permission and since prior permission was not immediately available, he had acquired properties in the names of his family members. He also produced documentary evidence in support of his case. The learned Trial Judge, after considering the evidence of the parties, accepted the oral evidence of the defendant which, according to him, was corroborated by documentary evidence and recorded the finding that the plaintiff had failed to prove that the lands in question had been acquired by Raniben from her earnings. The learned counsel for the appellant raised only a faint challenge to this finding but could not assail it seriously and show how it was erroneous. Having gone through the oral and documentary evidence which was led before me, I do not find any reason to interfere with the said finding.

7. As for the challenge to the execution of the deed

on the ground that the defendant no.1 had got the same executed by exercising influence and pressure on the plaintiff, the learned Judge, after referring to the evidence of defendant no.1 and his witness Anantkumar Ranchhoddas who was an advocate of 42 years' standing and who had been consulted when the document was executed and had prepared the draft (Exh.105), and the evidence of Odhavji Devji who had drafted the document at the instance of Anantkumar, rejected the plaintiff's allegation that the document had been obtained by defendant no.1 by exercising pressure and influence. It also came out in evidence that the plaintiff was not a minor when the deed was executed. This finding of the Trial Court is now not challenged on behalf of the appellant. The learned counsel for the appellant on the other hand, said that now they were relying on the said deed in support of their contention that the properties were joint properties.

8. The learned Judge rightly came to the conclusion that the plaintiff's challenge to the deed in question was barred by limitation. Since however, now the appellant does not challenge the execution of the document, it is not necessary to go into that question again.

9. The learned counsel for the appellant submitted that the recital in clause 22 of the document clearly shows that the rest of the properties were joint properties. At this stage, it would be necessary to refer to the material clauses of the deed dated 6th May, 1958 that was executed by four brothers namely Kalabhai Karsanbhai - the defendant no.2, Vikram Karsanbhai defendant no.3, Hardas Karsan, since deceased and Govind Karsan - the plaintiff to Karsanbhai Alabhai, the defendant no.1. In clause 6, it was stated that the defendant no.1 had given Kalabhai, the defendant no.2 lands bearing Survey Nos.1435/1 and 1435/2 and a plot in Rabari Wada in Veraval. It was also provided in clause 7 that in the said lands, Kalabhai had 2/3rd share and Bai Rani Dana, the mother had 1/3rd share. In clause 8, the defendant no.2 admitted that all the properties of the defendant no.1 were his self-acquired properties and even though he had no right in it, the defendant no.1 had given the said lands to defendant no.2. In clause nos.13 and 14 of the deed, it was recited that the immovable properties enumerated in clause 13 were the self-acquired properties of the defendant no.1 who had acquired the same from his own personal earnings and that the executants namely, the four brothers had no right in the same. In clause 22, it was stated that the properties

described in clause 6 were worth Rs.6,400/- and only those properties were separated and given to defendant no.2 but otherwise joint status continued.

10. The learned counsel for the appellant relied on the said recital in clause 22 that the joint status otherwise continues. However, the document has to be read as a whole because in clause nos.13 and 14, the four brothers admitted, in unequivocal terms. that the properties enumerated therein, which included the Talala lands, were the self-acquired properties of the defendant no.1 and they had no right in it. It is in evidence that soon after the deed was executed, the defendant no.1 got the Talala lands which stood in the names of defendants no.2 and 3, mutated in his own name and subsequently, he gave the lands to his two other sons, Vijay and Paresh before the suit was filed. Thus, the defendant no.1 treated those lands as his self-acquired properties though the deed was executed and the plaintiff never took any action to challenge the defendant no.1's subsequent dealings with the same. It was not the plaintiff's plea in the plaint nor was this his case at any stage that there was any ancestral property which could have formed a nucleus for the acquisition of the properties. As stated earlier, in the Trial Court the focus was on the source of funds out of which the properties were acquired. Now, it is sought to be contended that the defendant no.1 had treated them as joint properties relying on the recital in clause 22 of the deed. However, as stated above, the deed has to be read as a whole and the unchallenged dealings by the defendant no.1 with the Talala lands as his self-acquired lands after the deed was executed clearly show that they were not treated as joint properties. Thus, there is no substance in this contention.

11. The learned Trial Judge has also held that the suit was bad by non-joinder of parties since the two other brothers Vijay and Paresh had not been joined as defendants. It is in evidence that the Talala lands had been mutated in the names of Vijay and Paresh before the suit was filed. The plaintiff claims a share in the properties on the basis that they were joint properties. Those two brothers would also be a necessary party to the suit for partition. The learned counsel for the appellant contended that now those two brothers have been brought on record in the appeal. However, they have been brought on record as the heirs and legal representatives of their deceased father, the respondent no.1 who died during the pendency of the appeal. But they were not joined in the suit in their individual capacity. The

Trial Judge was right in holding that the suit was bad for non-joinder of parties.

12. The appellant has filed a number of Civil Applications.

13. The appellant has filed Civil Application No.990 of 1987 seeking leave to amend the plaint so as to add other properties in the Schedule to the plaint. He refers to the application for amendment made in the Trial Court and which had been granted. According to him, consequential change was not made in the Schedule. This application was filed on 12th March, 1987. Prior to it, the proposed respondents no.4 to 10 whose names are mentioned in para 8 of this Civil Application had purchased the said properties in 1986. When the appellant sought leave to amend the plaint in the Trial Court, there was no prayer for adding any properties to the said properties and, as stated earlier, the dispute survived only in respect of the Talala lands at the trial. There is no reason to grant the prayer for amendment which is made at a very late stage, particularly in view of the fact that the properties sought to be added in the Schedule had been sold to third parties before the application was filed. It will not be in the interest of justice to allow the amendment, as prayed for, at this stage. The application is, therefore, dismissed.

14. The appellant has also filed two Civil Applications seeking leave to produce additional evidence in the appeal. In Civil Application No.9001 of 2002, the appellant seeks leave to produce three sale deeds dated 18th July, 1958, 1st February, 1962 and 23rd April, 1962 and the statement made by respondent no.1 before the Talati of Talala on 25th June, 1990. In Civil Application No.1638 of 2003, the appellant seeks leave to produce the certified copy of the application dated 14th May, 1940 given by respondent no.2 to the Government of Junagadh State for grant of lands of Survey Nos.1435/1 and 1435/2 and the certified copy of the grant of the said lands dated 10th August, 1943. The learned counsel for the appellant cited a number of decisions in support of the prayer for production of additional evidence. However, there is no satisfactory explanation for non-production of the sale deeds and the application for grant of the lands and the document evidencing grant of the lands at the trial. As for the statement said to have been made by the respondent no.1 in 1990 before the Talati, no attempt was made to produce the same for all these years. The case does not fall under Rule 27 (a) or

(aa) of Order XLI of the Civil Procedure Code. Clause (b) of the said Rule 27 provides that the additional evidence may be produced if the Appellate Court requires any document to be produced to enable it to pronounce judgment or for any other substantial cause. However, in my opinion, those documents are not required for deciding the issues raised between the parties in the present appeal. There is no reason to allow production of evidence at this stage. The applications are, therefore, dismissed.

15. Lastly, it remains to consider Civil Application No.1639 of 2003. The appellant has filed this Civil Application alleging that the respondents no.1E Vijay Karsanbhai and respondent no.1F Paresh Karsanbhai have committed wilful and deliberate breach of the order of injunction made by this court in Civil Application No.3855 of 1980 restraining the respondents from further dealing with any of the suit properties under their control and management. At that time, Vijay Karsanbhai and Paresh Karsanbhai were not party to the proceedings. They were subsequently brought on record as the heirs and legal representatives of deceased respondent no.1 Karsanbhai Alabhai. It is in evidence that Karsanbhai Alabhai had mutated the Talala lands in favour of his sons Vijay and Paresh before the suit was filed. According to the appellant, Rajiben, Vijay and Paresh sold the plot bearing Survey No.118/1 in 2001. Now, the suit was in respect to Survey Nos.118/2 and 121/2 and it is in evidence that part of the said lands was exchanged for another land bearing Survey No.118/1 which belonged to the Government. Survey No.118/1 was not included in the Schedule of properties annexed to the plaint. In the circumstances, it is not possible to say that Vijay Karsanbhai and Paresh Karsanbhai have committed wilful breach of the injunction order as alleged by the appellant. The application is, therefore, dismissed.

16. In view of the above discussion, the appeal and the Civil Applications are dismissed with no order as to costs.

(M.C. Patel, J.)

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